Petition

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No. 81-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY P. MELLON, JR.,
Petitioner,

v.

JOHN F. BEASLEY CONSTRUCTION COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is an ironworker, who regularly reports to a barge and who spends approximately fifty percent of his time working onboard said barge in the middle of the Patapsco River and the remainder of his time doing work related to said barge, entitled to maintain an action under the Jones Act, 46 U.S.C., Section 688?

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Anthony P. Mellon, Jr., respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on June 24, 1981.

OPINIONS BELOW

On August 26, 1980, the United States District Court for the District of Maryland, filed a Memorandum and Order granting the Defendant's Motion for Summary Judgment. The unpublished Memorandum and Order are reproduced in the Appendix at Page 1a.

The judgment of the District Court was appealed to the United States Court of Appeals for the Fourth Circuit. On

June 24, 1981, the Court of Appeals issued an unpublished per curiam opinion affirming the judgment of the District Court. The Court's opinion is reproduced in the Appendix at Page 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit which is sought to be reviewed was entered on June 24, 1981, and this Petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 46:

Section 688

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law, right or remedy in cases of personal injury to railway employees shall apply; and in the case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(Mar. 4, 1915, ch. 153, § 20, 38 Stat. 1185; June 5, 1920, ch. 250, § 33, 41 Stat. 1007.)

STATEMENT OF THE CASE

Introduction

The Petitioner, Anthony P. Mellon, Jr., (hereinafter referred to as Plaintiff), brought an action in the United States District Court for the District of Maryland against his employer, the Respondent, John F. Beasley Construction Company, (hereinafter referred to as Defendant). The Complaint was separated into two counts, each invoking admiralty jurisdiction, the first for negligence, based upon 46 U.S.C. Section 688 (hereinafter referred to as the "Jones Act") and the second, for unseaworthiness of a vessel, based upon 28 U.S.C., Section 1333. The Complaint asserted that Plaintiff was a member of a crew, and had a more or less permanent connection with a vessel in navigation and was employed to work on a vessel in a capacity contributing to its essential purpose.

Previous Court Proceedings

In response to the Complaint, the Defendant filed a Motion for Summary Judgment. Said Motion moved for summary judgment on both Counts I and II. Regarding Count I, the Motion stated that as a matter of law the Plaintiff was not a member of the crew of a vessel, did not have a more or less permanent connection with any vessel and was not employed to work on a vessel in a capacity contributing to its essential mission and purpose, and therefore, lacked the prerequisites of being a Jones Act seaman. With regard to Count II, the Motion stated that since the Plaintiff's accident occurred on a bridge, the claim for unseaworthiness, as a matter of law, could not be maintained. After the Plaintiff filed its opposition, a hearing was held before the Honorable Shirley B. Jones, United States District Judge, on February 4, 1980. On August 26, 1980, Judge Jones filed a Memorandum and Order (App. 1a) granting the Defendant's Motion for

Summary Judgment on both Counts I and II. Judge Jones ruled that as a matter of law the Plaintiff's duties were primarily as an iron connector on a bridge, and that his duties aboard the vessel were not primarily in aid of navigation. The court concluded that, as a matter of law, the Plaintiff was not a Jones Act seaman and could not maintain an action against his employer for negligence. The Court further ruled that the Plaintiff's connection with the vessel was insufficient to survive the Motion for Summary Judgment on the unseaworthiness claim.

The United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court on June 24, 1981, in a three-paragraph unpublished per curiam opinion. (App. 11a).

Facts Relating to the Plaintiffs Seaman Status

A detailed Statement of facts can be found in Plaintiff's Memorandum in Support of its Opposition to Defendant's Motion for Summary Judgment, as well as in the brief of the Appellant before the United States Court of Appeals for the Fourth Circuit, all part of the record below. Said Statements of Fact are comprised of the sworn affidavits of five of the Plaintiff's co-workers, the Plaintiff's affidavit and deposition, the deposition of a co-worker, the affidavits of the Plan Manager for the Iron Workers Fringe Benefit Fund and seven Plaintiff's exhibits. Those facts relevant to the issues presented for review may be summarized as follows:

At the time of the occurrence involved herein, March 31, 1976, the Plainttiff was a journeyman ironworker and a member of Local No. 16 of the International Association of Bridge, Structural and Ornamental Iron Workers. He was working for the Defendant in the construction of the Francis Scott Key Bridge in Maryland.

In 1967 until the date of his crippling injury, the Plaintiff gained experience working aboard ships, on various bridge construction projects, and as a deck hand and hookup man on derrick barges.

The Plaintiff was first hired by the Defendant in the Spring of 1975 to work as a deckhand aboard a floating derrick barge. On December 1[illegible] 1975, the Plaintiff joined the "traveler" crew and was permanently assigned to a work barge, the E-116. It was this crew and barge with whom the Plaintiff was working at the time of his injury. The barge was a railroad carfloat, had a motive power of its own and was navigated every work day. The barge was acquired by the Defendant to aid in the bridge-building process. The barge was used to transport and store iron, tools, safety nets, equipment, chokers and men, to a point underneath the crane which was on the bridge. This crane would be stationed on the bridge superstructure and used to unload materials, iron, safety nets, men, equipment and tools from the barge. The work performed by the barge would be in direct connection with that of the crane, and served as an important element in the bridge-building process. The barge was also used as a work area for the Plaintiff's crew, and would be used exclusively by that crew. The crew leader, from whom the Plaintiff took all of his orders, spent essentially all of his time onboard the barge.

The Plaintiff had daily chores and navigational tasks onboard the barge, and would regularly perform a variety of work onboard which related to the bridge construction process. The Plaintiff was responsible for fastening and unfastening the mooring lines and acting as a lookout while the barge was being navigated from its mooring to an area underneath the bridge. The Plaintiff was also responsible for clearing the decks of ice and seagull droppings, tying up loose air and gas bottles, lashing and

unlashing material barges to the work barge and separating iron onboard. The Plaintiff spent some days exclusively onboard the barge, and *overall, spent approximately fifty percent of his total time onboard.* When a new load of iron would come in on the material barge, the Plaintiff, along with the rest of his crew, would stay on the barge to "shake out" the iron. This included separating the chords, diagonals and plumb posts, and preparing them to be unloaded on the bridge superstructure. The Plaintiff would also get the bolts together and organize and brush down the iron to clean rust off the joints.

Some days the Plaintiff and the rest of the crew would spend the day on the barge "shaking out" the safety nets. The safety nets were stored onboard the barge and were part of its equipment. Shaking out of the nets was a major task requiring the Plaintiff's whole crew. On other occasions, the Plaintiff stayed on the barge to send up bolts to the bolting-up gang.

On March 31, 1976, the day of the occurrence involved herein, the Plaintiff reported as usual to the barge, received his orders from the crew leader on the barge, helped navigate the barge to its destination beneath the crane and performed his regular tasks onboard. Thereafter, he, along with the other members of his crew, proceeded to the top chord of the superstructure. Pieces of steel were raised by the crane, from the barge, improperly "choked." Due to inclement weather, the Plaintiff was required to return the improperly choked steel back to the barge. It was during this maneuver that the improperly choked steel caused the Plaintiff to fall ninety feet into an improperly positioned safety net. Occupational Safety and Health Regulation, 29 C.F.R. 1926 [c][1] provides that safety nets shall be installed no more than 25 feet below the work surface.

It must be stressed that the District Court, in its Memorandum and Order (Appendix), accepted the Plaintiff's version of the facts as hereinabove summarized.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS, AND WITH DECISIONS OF THIS COURT, AS TO WHETHER A LABORER ENGAGED IN CONSTRUCTION WORK — WHO IS PERMANENTLY ASSIGNED TO A BARGE, AND WHO SPENDS A LARGE PERCENTAGE OF HIS TIME WORKING ABOARD SAID BARGE AND THE REMAINDER OF HIS TIME IN THE CONSTRUCTION PROCESS DOING WORK RELATED TO THAT BARGE — CAN BE A JONES ACT SEAMAN.

The Jones Act, 46 U.S.C., Section 688, provides in pertinent part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and at such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply . . ."

Although the Act refers to "seamen" it does not define that term. However, in *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946), this Court held that the Act's benefits are restricted to "members of a crew of a vessel." Thus, a Jones Act seaman is any seaman, a member of a crew of a vessel, injured in the course of his employment. Since *Swanson*, the Courts, through numerous decisions, have given substance to the terms "seaman" and "member of a crew of a vessel."

The test unanimously accepted by the Courts in determining "seaman" status, is (1) that there be a vessel in navigation, (2) that there be a more or less permanent connection with the vessel, and (3) that the plaintiff's duties serve naturally and primarily in aid of navigation,

or stated alternatively, (1) that the plaintiff be assigned permanently to a vessel *or* perform a substantial part of his work on the vessel, and (2) that the capacity in which he is employed or the duties which he performs contributes to the function of the vessel or to the accomplishment of its mission or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. See, *Wilkes v. Mississippi River Sand and Gravel Company,* 202 F.2d 383 (6th Cir. 1953) and *Offshore Company v. Robison,* 266 F.2d 69 (5th Cir. 1959).

The Petitioner seeks review of the District Court's ruling, affirmed per curiam by the Circuit Court, which held that the numerous duties performed by the Plaintiff aboard the barge were not "primarily in aid of navigation," and therefore, that the Plaintiff could not be said to be a Jones Act seaman as a matter of law. The lower courts' interpretation (App. 12) of the words "seaman" and one whose duties are "primarily in aid of navigation" are in direct conflict with the decisions of this Court and of all Circuit Courts which have addressed this issue. This conflict is most clearly observable with the First Circuit. In a case factually indistinguishable from the case at bar, *Bennett v. Perini Corp.,* 510 F.2d 114 (1st Cir. 1975) the First Circuit reached the conclusion that the plaintiff was a Jones Act seaman. On appeal from a judgment based upon a directed verdict for the defendant, the First Circuit, relying upon the following facts, found that there was a genuine issue of facts as to the plaintiff's seaman status under the Jones Act:

The plaintiff was a carpenter assigned to a crew to do cement form work in connection with a large concrete pier being poured in the construction of the Newport-Jamestown Bridge. The plaintiff regularly reported to a barge, upon which was mounted a crane. Said barge was

without motive power and was used in the bridge construction effort. The barge would be moored in such a manner that the crane could be used to move materials from the barge to the bridge while its deck could be used as a storage area and work platform for the construction crews. "Evidence was introduced that the [plaintiff] was employed to work with large wooden panels which were used to form molds into which the wet cement for the bridge pier was poured. His duties included constructing the panels and preparing them for assembly, fitting them together after they had been hauled into place by the barge crane, disassembling and removing the panels when the cement had hardened, and repairing and reshaping them for reuse on another portion of the pier. While much of this work necessarily took place on the pier (bridge) itself, there was evidence that a major part of the carpentry work was regularly done on the deck of [the barge] where the additional space provided the necessary platform for constructing and reworking the panels." *Bennett* at 117.

The First Circuit held that there was sufficient evidence that the plaintiff was permanently assigned to a vessel *or* performed a substantial part of his work on the vessel, and that the duties which he performed contributed to the accomplishment of the *vessel's mission, the construction of the bridge piers.*

The facts of the case at bar present an almost mirror image of those in *Bennett*. Both plaintiffs were laborers, they worked in crews engaged in the construction of a bridge, and both fell from the bridge on which they were working. Each reported everyday to a barge, and the respective barges were used in connection with the bridge construction efforts. Further, each plaintiff had duties onboard the barge preparing the construction materials.

The Defendant's counsel has conceded the obvious, that is, that *Bennett* is indistinguishable from the case at bar. The Defendant/Appellee's brief, submitted in the proceedings below before the Fourth Circuit, stated at Page 22, "[t]he only case which [Plaintiff] cites in support of his position, which cannot be readily distinguished, is *Bennett Perini Corp.*, 510 F.2d 114 (1st Cir. 1975) . . ."

The Fifth Circuit, in *Holland v. Allied Structural Steel Company, Inc.*, 539 F.2d 476 (5th Cir. 1976), citing *Bennett, supra* with approval, distinguished the facts before it from situations, as in *Bennett*, where the requisites for seaman status were met. See, *Holland, supra.*, at 487, F.N. 10 and 11.

Prior to *Bennett*, the First Circuit had reached a similar result in *Stafford v. Perini Corp.*, 475 F.2d 507 (1st Cir. 1973). There, as in the case at bar, the plaintiff was a laborer employed in the construction of a bridge. The evidence showed that the plaintiff's work was performed both on the bridge piers and on a barge. The court explained that, "since one of the primary functions of the vessel was apparently to provide a work area for the construction of the forms, it is clear that the (duties performed by the plaintiff) directly related to the performance of the (barge's) mission," and therefore, the question as to the plaintiff's seaman status was for the jury to decide.

Here, the courts below chose to reverse and ignore a trend, established by this Court and several Circuit Courts over the past forty years, of liberal construction of the term "seaman." Traditionally, the Supreme Court has scrupulously protected the plaintiff's right to a jury trial on the question of seaman status. See, *Texas Company v. Gianfala*, 350 U.S. 879 (1955); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1956); *Grimes v. Raymond Concrete*

Pile Company, 356 U.S. 252 (1958); *Butler v. Whiteman*, 356 U.S. 271 (1958).

The Circuit Courts have repeatedly noted that in deciding the issue of "seaman" status, the terms "seaman" and "member of a crew" have such a wide range of meaning under the Jones Act, as interpreted in the Courts, that except in *rare* cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. *Leonard v. Exxon Corp.*, 581 F.2d 522 (5th Cir. 1978). See also, *Slatton v. Martin K. Eby Construction Company, Inc.*, 506 F.2d 505 (8th Cir. 1974). In 1940, this Court first made clear that "members of a crew" are not confined to "those who can hand, reef and steer." *South Chicago Coal and Dock Company v. Bassett*, 409 U.S. 251 (1940). See also *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1957). And this decision, that performance of duties "primarily in aid of navigation" is not limited to those who hand, reef and steer, has been echoed by the Circuit Courts, including the Fourth Circuit. See, *Jeffrey v. Henderson Bros.*, 193 F.2d 589 (4th Cir. 1951); *Wilkes v. Mississippi River Sand and Gravel Co.*, 202 F.2d 383 (6th Cir. 1953); *Offshore Company v. Robeson*, 266 F.2d 69 (5th Cir. 1959). As the Fifth Circuit noted in *Offshore Company v. Robison, supra.*, there are "cases piled on cases in which recovery is allowed when by no stretch of the imagination can it be said that the claimant had anything to do with navigation, and is a member of the ship's company only in the sense that his duties have a connection with the mission or the function of the floatable structure . . . Expansion of the terms 'seaman' and 'vessel' are consistent with the liberal construction of the (Jones) Act that has characterized it from the beginning and is consistent with its purposes." *Id.* at 780.

In each of the following cases, on facts substantially similar to those in the case at bar, this Court, and the

respective Circuit Courts, have found a genuine issue of fact as to a claimant's seaman status: *Wilkes v. Mississippi River Sand and Gravel Company*, 202 F.2d 383 (6th Cir. 1953), involving a laborer on a dredge whose sole job was to level off the gravel dumped onto the barges; *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952), a fireman on a floating derrick used in connection with pouring concrete into certain forms incident to building a bridge; *Gianfala v. Texas Company*, 350 U.S. 879 (1955), a member of an oil "drilling crew" who was assigned to a submersible drilling barge; *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), a handyman on a dredge used as a stationary earth removing machine who had no duties connected with the movement of the dredge and was injured ashore; *Grimes v. Raymond Concrete Pile Company*, 356 U.S. 252 (1958), a pile driver who had spent only six hours on a barge used to transfer materials to a Texas tower; *Offshore v. Robison*, 266 F.2d 69 (5th Cir. 1959), a laborer in a "drilling crew" assigned to a submersible mobile drilling platform; *Stanley v. Guy Scroggins Construction Co.*, 297 F.2d 374 (5th Cir. 1961), a construction worker who had no functions to perform relating to the navigation or movement of the vessel; *Harney v. William Moore Building Corp.*, 359 F.2d 649 (2nd Cir. 1966), a night watchman who spent twenty-five percent of his time onboard a barge moored to the bank of a river; *Slatton v. Martin K. Ebby Construction Company, Inc.*, 506 F.2d 505 (8th Cir. 1974), a construction worker who performed a portion of his work onboard a barge; *Davis v. Hill Engineering*, 549 F.2d 314 (5th Cir. 1977), a construction worker who spent fifteen percent of his time onboard a barge; and *Landry v. Amoco Production Company*, 595 F.2d 1070 (5th Cir. 1979), a roustabout involved with both land and water related work.

Thus, this Court and the Circuit Courts have repeatedly held that laborers, similar to the Plaintiff herein, that is, construction workers who spend part of their shift on land and part on the vessel, create a genuine issue of fact as to their seaman status, and therefore, the issue of their seaman status should be submitted to a jury for determination. Yet, in the instant case, the lower courts, oblivious to the wealth of precedence, held, *as a matter of law*, that the Plaintiff was not a Jones Act seaman. The result of this ruling is to create a direct conflict not only within the Fourth Circuit, but also between the Fourth Circuit and the First, Second, Fifth, Sixth and Eighth Circuits, and with the decisions of this Court. The decisions below deny a cause of action to those whom Congress sought to protect. A review by this Court is absolutely necessary to undo the gross injustices imposed by the decisions below.

CONCLUSION

For the aforegoing reasons, the Petitioner requests this Court to issue a Writ of Certiorari to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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In The United States District Court
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Civil Action No. J-79-621

Anthony P. Mellon, Jr.,
Plaintiff

v.

John F. Beasley Construction Company,
Defendant

MEMORANDUM AND ORDER

Society has a difficult time in recognizing that the law, oftentimes, simply is not uniform. Courts, while faced with this problem in varying degrees every day, will likewise be confused on particular problems where there appears a divergence of judicial opinions on essentially indistinguishable facts. One such a problem is who is a "seaman" and what is a "vessel" within the Jones Act, 46 U.S.C. § 688.

Plaintiff, Anthony P. Mellon, Jr., has filed a complaint alleging that his employer, John F. Beasley Construction Company, was negligent in positioning, stringing and erecting safety nets during construction of the Baltimore Outer Harbor Crossing (Francis Scott Key Bridge). Plaintiff, while working on the bridge on March 31, 1976, allegedly attempted to avoid a piece of steel which was being lifted to the bridge from a barge below and slipped. He landed in the safety nets below and was dreadfully injured. Plaintiff, in Count One of his Complaint, contends that he was a Jones Act seaman and thus can maintain a suit against his employer; Count Two is a claim for unseaworthiness against this employer.

Defendant contends that the plaintiff was an ironworker, employed by it to aid in the erection of a bridge; that any maritime nexus Mellon had was only sporadic and secondary to his main function; and, therefore, Mellon, as a matter of law, cannot be a seaman. Defendant further argues that in any event the work barge (E-116) involved in this case was not a vessel within the ambit of the Jones Act. Plaintiff responds that the question of seamen status is a question of fact to be left for the jury and cannot be determined at this juncture. Plaintiff sets forth numerous duties on his part that, he postulates, indicate a genuine dispute as to material facts precluding summary judgment on the question of seamen status. Likewise, the alleged usage and navigational maneuverability of the vessel is also disputed by the plaintiff, thus necessitating a factfinding process.

As one of the seminal cases in this area stated, "except in rare cases, only a jury or trier of facts can determine [Jones Act][1] application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue *is not solely a question of law*, when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts." *Offshore Co. v. Robison*, 266 F.2d 769, 780 (5th Cir. 1959); Norris, *The Law of Seamen*, § 664 at 297-98; 6 *Moore's Federal Practice*, ¶ 56.17 [35] at 56-910. Concomitantly, defendant, as the moving party, carries the burden as to its motion. The Court is well aware that summary judgment should not be granted.

> unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party

[1] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply;. . . ."

> cannot prevail under any circumstances. Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom, or if reasonable men might reach different conclusions.

Phoenix Sav. & Loan, Inc. v. Aetna Casualty & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967); 10 Wright & Miller, *Federal Practice and Procedure*, § 2712 at 378-83. Even if upon undisputed facts and the permissible inferences from those facts there may be more than one conclusion drawn, summary judgment is not appropriate. *Charbonnages De France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979); *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951).

Nevertheless, there is no proscription to the granting of summary judgment, where, taking all the facts in the light most favorable to the opposing party [Mellon], the moving party is entitled to judgment as a matter of law. For the reasons set forth below, the motion for summary judgment must be granted.

Plaintiff, in opposing the motion, contends that he was responsible for the mooring lines and acted as a lookout while the barge moved from the piers toward the area on the bridge where the Traveler (the derrick plaintiff worked with) was. Also, plaintiff was responsible for clearing the decks of ice, cleaning the decks of sea gull droppings, tying up loose air and gas bottles to prevent them from moving, lashing material barges to the work barge, and separating old and new iron. Plaintiff did not sleep aboard the vessel, ate there rarely, did not carry seamen's papers, nor did he belong to any seamen's organizations. Whatever duties plaintiff had on board the work barge, the E-116, defendant avers, were incidental to the job he was assigned to on the Floyd Menees crew[2], *i.e.*,

[2] While the parties have argued over the proper nomenclature to use, it does not particularly matter to the Court for purposes of this Motion whether "crew" or "gang" properly describe the men working for Menees.

an iron connector on the bridge. The barge was an instrument of conveyance — a way to get to that portion of the bridge yet unconnected to the Hawkins Point or Sollers Point sides where the plaintiff was working. At the construction site, it was sometimes used as a work platform.

The initial question before the Court is whether there is any evidentiary basis at this point to permit the case to proceed to trial. *See Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 372 (1957). While no hard and fast rule has been developed to define a seaman, *see South Chicago Co. v. Bassett*, 309 U.S. 251, 258-59 (1940), a three-prong test has been fashioned which can aid a court in this determination. With the legal predicate in mind that any Jones Act benefits are confined to a seaman, *i.e.*, a member of the crew of a vessel, the first prong examines whether "one [is] more or less permanently attached to a vessel or fleet; [second] he must be one whose duties serve 'naturally and primarily as an aid to navigation' in the broadest sense, and [third] the vessel must be in navigation." *Whittington v. Sewer Const. Co.*, 541 F.2d 427, 436 (4th Cir. 1976). *Accord, Richardson v. Norfolk Shipbuilding & Drydock Corp.*, 479 F. Supp. 259, 262 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4th Cir. 1980); *Offshore Co. v. Robison*, 266 F.2d at 779; Norris, *The Law of Seamen*, §668 at 301-02. Prior to applying this three-prong test to the facts in this case, an examination of some of the facts in other cases is enlightening.

In *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980), the Court of Appeals recognized that the existence of seamen status generally presents issues of fact not conducive to summary judgment disposition. In *Caldwell*, however, the employee's sole maritime nexus was to cast off the ship's lines, a function he performed in the scope of his duties while working for a railroad. He in no way, concluded the Court, could be considered a seaman. *Id.* at 1050. In *Stokes v. B. T. Oilfield Services, Inc.*, 617 F.2d 1205 (5th Cir. 1980), the plaintiff had worked only

one day at sea, and had never eaten or slept on board the vessel. While the Court recognized his land-based activities had a "maritime taint," these activities made him out to be a longshoreman, and not a seaman. *Id.* at 1206-07. *E. g., Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190-91 (cleaning, painting, waterproofing the boats and preparing them for navigation did not confer seamen status); *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979) ("no evidence that decendent performed even the slightest work-related function aboard the Bo-Truc II"); *Shows v. Harber*, 575 F.2d 1253, 1254 (8th Cir. 1978) ("insufficient maritime nexus and no vessel was involved"). The first and second prong which examine the relational degree between the employee and the vessel are obviously dependent on the facts. Most of the courts which have found no genuine dispute as to material facts have done so on these prongs. In *Billings v. Chevron, U.S.A., Inc.*, 618 F.2d 1108 (5th Cir. 1980), the Court of Appeals held that a roustabout who worked on the defendant's fixed platform rig in the Gulf of Mexico was not a Jones Act seaman and affirmed the district court's entry of summary judgment. He was not permanently assigned to a vessel (prong one) nor did he perform a substantial part of his work on a vessel (prong two) " 'with at least some degree of regularity and continuity' " *Id.* at 1110 (quoting *Keener v. Transworld Drilling Co.*, 468 F.2d 729, 732 (5th Cir. 1972)). The Court agreed that the plaintiff's *primary duties* performed on the platform concerned the drilling operation and activities preliminary and subsequent to it. *Id.* at 1109-10. "He was not permanently assigned to any vessel; rather his tasks aboard any of the tenders which at times docked alongside the rig were related to his employment on the platform. He was not hired to be a crewmember of any vessel and had nothing to do with the regular operations of one." *Id.* at 1110. As the *Billings* court recognized, the standards set forth in *Robison* to determine seamen status are in the conjunctive and not the disjunctive.

Final analysis in determining the propriety of summary judgment in the present case must center on *Whittington v. Sewer Constr. Co.*, 541 F.2d 427 (4th Cir. 1976); *Lewis v. Roland E. Trego & Sons, Inc.*, 501 F.2d 372 (4th Cir. 1974), *aff'ing in part*, 359 F. Supp. 1130 (D. Md. 1973); *Richardson v. Norfolk Shipbuilding and Drydock Corp.*, 479 F. Supp. 259 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4th Cir. 1980).

In *Whittington*, the plaintiff was hired as a "crane and backhoe operator on the demolition of a bridge." 541 F.2d at 431. He was injured while being lowered from the bridge to a barge below. As relevant herein, the Court found that the plaintiff was neither permanently attached to the vessel, nor did his duties serve primarily as an aid to navigation. While the bridge in *Whittington* was attached to land, (in the case at bar it was still under construction), such a determination is not relevant to the Court's ultimate conclusion as to Mellon's primary duties. In *Lewis*, Judge Harvey of this Court realized that while some cases of this sort do not have essential facts in dispute, the case before him had factual controversies necessitating credibility assessment. 359 F. Supp. at 1132. Judge Harvey held that the plaintiff never had seaman's papers, had never been employed as a seaman or "as a member of the crew of any vessel. . . . In the course of his duties [as a general laborer] plaintiff would occasionally do work on each one [three] of these floating structures." *Id.* at 1133. The connection between the vessel and the plaintiff's limited work on it was "sporadic and merely incidental to his primary land-based activities." *Id.* at 1136. The Court of Appeals summarized the salient facts and agreed that the plaintiff was not sufficiently connected to any vessel to be a member of the crew, and thus not a Jones Act seaman. 501 F.2d at 373. Finally, in *Richardson*, the district court granted summary judgment[3]

[3] Two excellent cases on this question are Judge Wisdom's opinion in *Holland v. Allied Structural Steel Co., Inc.*, 539 F.2d 476 (5th Cir. 1976), *cert. denied*, 429 U.S. (1977) and Judge Gibbon's opinion in *Griffith v. Wheeling Pittsburgh Steel Corp.*,

in favor of the defendant, finding that the plaintiff did not have a permanent attachment to any vessel. 479 F. Supp. at 263. "Rather, they were employed by the shipyard as sandblasters; they lived, ate, and slept on shore in their own residences; and they received their work assignments on a daily rotational basis. The law requires more than the temporary relationship between the vessel and the worker which existed in the present case." *Id.* at 262. As to the alleged duties Mellon performed on E-116, defendant contends that even if he did all of them, they were not naturally and primarily in aid of navigation, they were incidental to his main function as an iron connector on the bridge and that if he performed any jobs on E-116, they were voluntary and not as part of his job. *Lynn v. Heyl and Patterson, Inc.*, 483 F. Supp. 1247, 1250-52 (W.D. Pa. 1980).

Plaintiff answers that he was permanently assigned to the E-116 and that his activities on the bridge were only half of his total job; the other half was as a crew member of E-116. This is not a case where, for example, the duties of the employee are so clear as to permit a conclusion without hesitation that there are essential factual issues in dispute. *E.g. Cheuvront v. Pittsburgh & Lake Erie Railroad Company*, 477 F. Supp. 193, 196 (W.D. Pa. 1979). Viewing all the evidence (which is indeed copious) in the light most favorable to the plaintiff, it is clear that plaintiff's duties were primarily as an iron connector *on*

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521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). In *Holland*, the Court of Appeals traced the standard of review from *Robison* to recent applications of the *Robison* test. 539 F.2d at 479-86. The Court sustained the district court's granting of summary judgment for the defendant, in a factual scenario similar to the present case, holding that the plaintiff's connection to the water was "transitory" at best, nor did he perform a "substantial part" of his work on a vessel. *Id.* at 486-87.

In *Griffith*, the Court of Appeals held that the plaintiff's connection with the crew of a barge was "temporary" and that he performed, while on the barge, no duties primarily in aid of navigation of the vessel. 521 F.2d at 37-38. As a matter of law, the Court held this insufficient evidence of seamen status.

the bridge. The purpose of the vessel E-116 vis-a-vis Mellon and the rest of Menees crew was two-fold: first, to physically transport the workers to the unconnected portions of the bridge they were working on; and second, it was sometimes used as a workplatform, as well as a place to wait out foul weather until work could be resumed on the bridge. The affidavits of William J. Gigl, Project Manager for defendant during construction of the bridge (Exhibit 1 attached to Motion for Summary Judgment), and Floyd E. Menees, foreman of the raising gang assigned to the Traveler, allege that Mellon was first and foremost an iron worker. The affidavits of Jerry Murphy, Tony Bennett, Joseph Linzey, Tony Mink, Bobby Glenn and the deposition of Roy Quintal all contend that significant duties were performed by Mellon on the E-116 both in good weather and in bad. While Mellon may have performed some duties on the E-116, they were not significant in and of themselves or in connection with his duties as an iron connector. Mellon has attached the affidavit of Robert T. Shaffer, Jr. who was the Plan Manager for the Fringe Benefits Fund of Mellon's union. Within the scope of his duties, he would see monthly reports filed by the defendant with the union which contain the official hours worked for each employee. The hours worked, according to this exhibit (No. 8) by Mellon are greater than those mentioned in Gigl's affidavit. The permissible inference, plaintiff contends, is that this time was spent on the E-116 performing duties primarily in aid of the vessel's navigation. Even assuming that any discrepancy in the actual hours worked were on the E-116 performing the functions Mellon has claimed he did, such discrepancy is not material to the Court's conclusion. Whether undertaken voluntarily or ordered by Menees, Mellon's "duties" aboard the E-116 in the broadest sense were not primarily in aid of navigation.

Applying the standards as set forth in *Robison* and *Whittington*, and mindful of the liberal construction of the Jones Act as required, *Offshore Co. v. Robison*, 266 F.2d at

780, the Court concludes that the plaintiff cannot be said to be a Jones Act seaman. The Court is likewise aware that "a very low evidentiary threshold, even marginal claims are left for jury determination." *Leonard v. Exxon Corp.*, 581 F.2d 522, 524 (5th Cir. 1978). Reasonable minds could not differ, however, that Mellon's primary duty was on the bridge and not on the E-116, and that any duties performed by Mellon while on the E-116 were not sufficient to confer seamen status. *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975), stated that "[w]hile much of this work [constructing and assembling wooden panels] necessarily took place on the pier itself, there was evidence that a major part of the carpentry work was regularly done on the deck of SCOW 101, where the additional space provided a necessary platform for constructing and reworking the panels." *Id.* at 117. The exact time spent on the vessel was not known but there was sufficient evidence to create a jury issue. Such is not the case here.

Not having met these threshold prongs (*i.e.* one who is permanently attached to a vessel and whose duties serve naturally and primarily in aid of navigation) it becomes immaterial whether the E-116 was a vessel within the ambit of the Jones Act.

Defendant also contends that plaintiff's claim for unseaworthiness under Count Two must, as a matter of law, fail. "Normally, unseaworthiness, *where there is a dispute in the testimony or differing inferences can be drawn from the evidence*, is a matter for the jury's determination. *Dunlap v. G & C Towing, Inc.*, 613 F.2d 493, 496 (4th Cir. 1980) (emphasis supplied). While there appears a facial inconsistency between *Lewis*, 501 F.2d at 374 and *Whittington*, 541 F.2d at 433, it is important to remember that in *Lewis* the Court was referring to the ability to *recover* damages based on a claim of unseaworthiness. The *Whittington* Court explained the distinction as follows:

> There is a failure on the part of the plaintiff to distinguish "seaman" from "one who does the work of

a seaman." The term "seaman" when used in a jurisdictional sense refers to one who is a "member of the crew" of a vessel. *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940). The phrase "one who does the work of a seaman" is used to define the class of workers who are protected by the warranty of seaworthiness, and is applied only after jurisdiction has been found to exist. *See United Pilots Association v. Halecki,* 358 U.S. 613 (1959); *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946).

* * * * * *

A "seaman" as the term is used in a jurisdictional sense means one who is "permanently attached to and employed by . . . [a vessel] as a member of its crew." *Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370, 372 (1957). A "member of the crew," as we interpret that phrase, refers to those employees of a vessel "who are naturally and primarily on board to aid in her navigation." *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, 260 (1940). Hence, one cannot invoke admiralty jurisdiction by alleging his status as that of a "seaman" merely because he happens to be injured while performing a task in the course of his employment which traditionally would be the task of a seaman. 541 F.2d at 433-34.

It is clear that at the time of the injury, and for most of the time while working, Mellon was on the bridge as an iron connector. The "thread" connecting Mellon to the E-116 thus factually supporting a claim for unseaworthiness is far too thin to survive the motion for summary judgment. The motion, therefore, is granted.

SHIRLEY B. JONES,
United States
District Judge.

DATED: August 26, 1980

United States Court of Appeals
For The Fourth Circuit

No. 80-1690

Anthony P. Mellon, Jr.,
Appellant,

v.

John F. Beasley Construction Company,
Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Shirley B. Jones, District Judge.

Argued May 4, 1981 *Decided June 24, 1981*

Before WINTER, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

Bertram M. Goldstein (Robert J. Weltchek on brief) for Appellant; Manfred W. Leckszas, John H. West, III (Ober, Grimes & Shriver on brief) for Appellee.

PER CURIAM:

Anthony P. Mellon, Jr. appeals from the district court's grant of summary judgment for his former employer, the John F. Beasley Construction Co., in an action brought to recover damages for injuries he sustained while working

as an ironworker-connector in the construction of the Francis Scott Key Bridge in Baltimore's Outer Harbor. In one count of his complaint, Mellon alleged that he was a "seaman" under the Jones Act, 46 U.S.C. § 688, and could therefore maintain suit against Beasley for negligence; in the other, he claimed that the barge on which he performed a certain amount of his work was unseaworthy.

In reliance upon *Whittington v. Sewer Const. Co.*, 541 F.2d 427 (4 Cir. 1976), the district court ruled as a matter of law that Mellon was not a seaman because his duties did not serve "naturally and primarily as an aid to navigation in the broadest sense," and he could not therefore assert a claim under the Jones Act. Also in reliance on *Whittington*, the district court further ruled that Mellon's injuries did not have a sufficiently close maritime nexus to provide it with admiralty jurisdiction over the unseaworthiness claim.

On appeal, Mellon argues that the district court erred both in deciding the issue of his seaman status on summary judgment because it presented a question of fact for a jury, and in ruling that it did not have admiralty jurisdiction over the unseaworthiness claim. We conclude otherwise. Having considered the record of the proceedings below, the briefs, and the oral arguments of counsel, we affirm for reasons sufficiently stated in the opinion of the district court. Anthony P. Mellon, Jr. v. John F. Beasley Construction Company, Civil No. J-79-621 (D. Md. August 26, 1980).

AFFIRMED.

Opposition

No. 81-558

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OCT 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY P. MELLON, JR.,

Petitioner,

v.

JOHN F. BEASLEY CONSTRUCTION COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court review the decision of the district court and the court of appeals which, consistent with established precedent and sound reasoning, held as a matter of law that an ironworker, who was injured while erecting steel during the construction of a bridge, was not a seaman under the Jones Act?

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No. 81-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY P. MELLON, JR.,

Petitioner,

v.

JOHN F. BEASLEY CONSTRUCTION COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The Respondent does not dispute the portions of the Statement of the Case of the Petitioner which are contained in the subsections entitled "Introduction" and "Previous Court Proceedings." However, the subsection entitled "Facts Relating to the Plaintiff's Seaman Status" is incomplete. Accordingly, the Respondent submits the following additional facts which fully and accurately describe the status of the Petitioner during the course of his employment by the Respondent.

The Petitioner was a journeyman ironworker who was injured on March 31, 1976, when, while erecting steel on top of the Francis Scott Key Bridge, then under construction over Baltimore Harbor, he fell into a safety net attached to the bridge. From December 15, 1975, until the time of his accident, Petitioner had been assigned by the Respondent to work as a "connector" in one of the raising gangs. As such, his primary job was to place himself on top of the bridge and there to receive, steady, align and fasten steel which was being raised by the Traveler, a fixed guy derrick attached to the bridge.

As that portion of the bridge truss from which Petitioner fell was being built over open water, as the steel to be erected had to come to rest at ground level before being raised by the Traveler, and as the connectors and other men working on the bridge needed support in the way of tools, spare parts and supplies, it was necessary for the Respondent to provide a work platform and mooring dock underneath the Traveler. Respondent did this by engaging a retired railroad carfloat, known as the E-116. It is undisputed that the E-116 had no propulsion engine, no propeller, no propeller shaft, no red and green running lights, no wheel, no tiller, no rudder, and no sleeping or eating accommodations. During the time that the E-116 was utilized by the Respondent in the construction of the bridge, it was used strictly as a work platform and mooring dock. It had limited mobility by means of a winch which Respondent had installed on the work surface. Heavy wires extending from drums on the winch, and fastened on one side to the bridge pier and on the other side to anchor points off-shore, permitted limited lateral movement of the E-116 to position underneath the Traveler crane.

The E-116 was not designed to carry a crew, and none was assigned to it by the Respondent. While the Petitioner

performed occasional duties on the E-116, these amounted to no more than untying mooring lines, acting as lookout during the lateral movement of the platform and removing debris from the platform surface. In fact, the undisputed records of the Respondent show that the vast majority of the Petitioner's work time, over 93%, was spent as a connector on the bridge. It was while working as an ironworker/connector on top of the bridge and incurring risks peculiar to that line of work, that the accident occurred.

REASONS FOR DENYING THE WRIT

INTRODUCTION

This case involves an attempt by the Petitioner, a journeyman ironworker, who was injured while erecting the steel truss of a bridge, to bring himself within the coverage of the Jones Act (46 U.S.C.A. § 688), as distinguished from compensation remedies under state law, by contending that he was a seaman. After a careful examination of the statute and the cases decided thereunder, and reviewing the facts in the light most favorable to the Petitioner, the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit held as a matter of law that Petitioner simply was not a seaman. The decision of the Fourth Circuit is not in conflict with any decision of this Court or any other Court of Appeals, and there is no other important reason for hearing this case. Accordingly, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO THE APPLICABLE LAW FOR DETERMINING SEAMAN STATUS UNDER THE JONES ACT AND THE DECISION BELOW IS CONSISTENT WITH THE LAW IN THE CIRCUITS AND THE LAW OF THIS COURT.

While the Jones Act does not define the word "seaman", the Petitioner concedes that all courts are in agreement that one seeking the benefit of that statute must prove (1) that he is a member of a crew and have a more or less permanent connection with a vessel; and (2) that his duties serve naturally and primarily as an aid to navigation in the broadest sense; and (3) that the vessel be in navigation. *Whittington v. Sewer Construction Co.*, 541 F.2d 427 (4th Cir. 1976); *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959). On the undisputed facts supported by an ample record, the district court and the court of appeals held that the Petitioner could not be deemed a seaman because his primary duties did not serve naturally and primarily as an aid to navigation in the broadest sense.

The Petitioner contends that the decision in this case cannot be reconciled with *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975), where the First Circuit held that it was for the jury to decide whether one who spent a "major part" of his day doing carpentry work on a vessel was a seaman within the meaning of the Jones Act. *Bennett*, however, is vastly different from the case at bar, where the Petitioner, an ironworker, spent the overwhelming part of his work day erecting steel on a bridge under construction and had only sporadic contacts with, and had limited duties on, the E-116. In such instances, the courts have consistently held that seaman status must be denied as a matter of law. *Labit v. Carey Salt Co.*, 421 F.2d 1333 (5th Cir. 1970). Accordingly, *Bennett* and the case at bar can be read consistently for the proposition that while the determination of seaman status can be a mixed question of

law and fact, where the facts are undisputed and only one rational inference can be drawn from the evidence, it is incumbent upon the court to resolve the question as a matter of law. *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980).

Although the judicially established test for determination of seaman status under the Jones Act has been somewhat flexible and has permitted persons serving in a variety of tasks on board a vessel to be declared "seamen", no case has ever held that one who was employed to erect steel on a bridge under construction is a seaman. The only cases that have considered this precise question have ruled to the contrary: as a matter of law, such an individual is not a seaman. *Holland v. Allied Structural Steel Co., Inc.*, 539 F.2d 476 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977), and *Lynn v. Heyl and Patterson, Inc.*, 483 F. Supp. 1247 (W.D. Pa.), *aff'd*, 636 F.2d 1209 (3rd Cir. 1980). Contrary to the contentions of the Petitioner, therefore, the decision in this case is consistent with established precedent, there is no conflict in the Circuits and the question is not one of importance requiring the attention of this Court.

The Petitioner also contends that the decision in this case is inconsistent with a series of cases decided by this Court a quarter of a century ago. *Gianfala v. Texas Co.*, 350 U.S. 879 (1955); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1956); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958); and *Butler v. Whiteman*, 356 U.S. 271 (1958). Most representative of this group of cases is *Senko* which held that it was for the jury to decide whether a deckhand on a dredge was a seaman where his primary job was to load, unload and maintain the dredge, where he was employed almost solely on the dredge, where he was to have significant navigational functions on the dredge once it got underway, and where he was injured while ashore performing a task beneficial to the dredge. The

district court in the case at hand carefully considered *Senko*, but noted that the status of the plaintiff there was significantly different from that of the Petitioner. While the Petitioner on occasion untied mooring lines, acted as a lookout and cleaned the platform of the E-116, such sporadic contacts and incidental duties have never been deemed of a nature sufficient to confer the status of a seaman. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940). Moreover, it is important to note that other cases which have been confronted with the factual scenario presented by the case at bar have all considered *Senko*, but held, nevertheless, that the individual in question was not a seaman. *Holland v. Allied Structural Steel Co., Inc., supra; Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Longmire v. Sea Drilling Corp., supra; Lynn v. Heyl and Patterson, Inc., supra; Whittington v. Sewer Construction Co., Inc., supra; Bellomy v. Union Concrete Pipe Co.*, 297 F. Supp. 261 (S.D. W.VA. 1969), *aff'd*, 420 F.2d 1382 (4th Cir.), *cert. denied*, 400 U.S. 904 (1970). As the Fifth Circuit noted in *Longmire*, at p. 1347:

> It can hardly be said that Longmire's incidental activities aboard the tender-maintenance, moving supplies to and from the drilling platform, and stowing the anchor chain - were sufficient, *when viewed in the context of his entire employment as a member of the drilling crew, to amount to performance of "a significant part of his work aboard the ship with . . . some degree of regularity and continuity."* We therefore affirm the district court's summary judgment in favor of Sea Drilling on the issue of Longmire's seaman status. (Emphasis added).

While the Petitioner would like to have this Court believe that there is a conflict between the case at bar and the precedents forged this Court, just the opposite is true: on

the question of seaman status, the law is now so well-established as to leave no room for doubt that the district court and the court of appeals are correct.

II.

ALTHOUGH NOT ADDRESSED BY THE FOURTH CIRCUIT, THE WRIT OF CERTIORARI SHOULD BE DENIED ON THE ADDITIONAL GROUND THAT THE PETITIONER WAS NOT ASSIGNED TO A "VESSEL" AND THEREFORE HAS NO CAUSE OF ACTION UNDER THE JONES ACT.

The holding that the Petitioner does not have a cause of action under the Jones Act is also justified on the ground that the E-116 was not a "vessel" within the meaning of that term as judicially construed. Accordingly, even though the district court and the court of appeals did not find it necessary to rule on this point, the undisputed facts and applicable precedent require denial of the Petition for Writ of Certiorari on this separate ground.

In *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), the Court held that the mere fact that an object floats on water does not render it a "vessel" for maritime jurisdictional purposes. Rather, the determinative factors for deciding whether such an object is a vessel are the purpose for which it was constructed and the business in which it was engaged at any particular time. *The Robert W. Parsons*, 191 U.S. 17 (1903). Consequently, where the object is used as a floating construction platform, the law is clear that such an object cannot be deemed a vessel. *Leonard v. Exxon Corp.*, 581 F.2d 522 (5th Cir. 1978), *cert. denied*, ___ U.S. ___, 99 S.Ct. 2032 (1979); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973); *Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969); *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (1st Cir. 1973). Under the undisputed facts of this case, the E-116, which had no means of propulsion, was

moved solely by means of a temporarily installed winch, had no running lights, propeller, tiller or rudder and was placed on site for the sole purpose of serving as a construction platform and mooring dock, was not a vessel as that term is understood in the Jones Act context. Accordingly, even had the courts below found that the question of seaman status was for a jury, this Court should still deny the Petition for Writ of Certiorari because the Petitioner was not associated with any vessel.

CONCLUSION

The holding of the district court and the Fourth Circuit that the Petitioner, a journeyman ironworker who was injured while erecting steel on a bridge construction site, was not a seaman, was entirely correct and consistent with the established law of the other Circuits and this Court. Yet, even if the Petitioner's status could conceivably have raised a question of fact to be decided by a jury, his cause of action under the Jones Act must still fail because the E-116, to which he claimed association as a crewman, was not a vessel.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October 16, 1981